96-8837

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DONALD E. CLEVELAND
ENRIQUE GRAY-SANTANA
PETITIONERS

v.

UNITED STATES OF AMERICA
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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96-8837
Cleveland
v.
United States

QUESTION PRESENTED

Whether an occupant of a moving vehicle "carr[ies] . . . a firearm" in violation of 18 U.S.C. § 924(c), merely because the vehicle's locked trunk contains a firearm that is completely inaccessible to anyone in the passenger compartment.

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OTHER AUTHORITIES

Donald Cleveland and Enrique Gray-Santana hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 106 F.3d. 1056, and reprinted at App. 1a-28a. The unreported opinions of the United States District Court for the District of Massachusetts affirming Gray's and Cleveland's convictions under 18 U.S.C. § 924(c) are reproduced at App. 29a-41a and App. 42a-55a, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on February 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 provides, in pertinent part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years[.]"

STATEMENT OF THE CASE

Donald Cleveland and Enrique Gray-Santana, along with two others, were arrested on October 18, 1994, by Drug Enforcement Administration (DEA) agents. DEA agents conducting surveillance at an apartment in Hartford, Connecticut, suspected drug trafficking activity and followed two vehicles to the Boston area. Once in Boston, occupants of the cars driven from Hartford met with Cleveland and Gray, who arrived in the Symphony Hall area driving a Mazda. Agents executed a stop and search and found three firearms in the locked trunk of the Mazda. The firearms were in a closed bag, packed under clothing. Agents found five kilograms of cocaine in an electronically controlled compartment of an Isuzu Trooper, one of the vehicles from Hartford.

On March 15, 1995, a federal grand jury returned an indictment against Cleveland and Gray and, in July of 1995, each entered conditional pleas to (1) attempting to possess cocaine with intent to distribute and, (2) using and carrying a firearm during and in relation to a drug trafficking crime, reserving the right to appeal adverse rulings by the trial court on their motions to suppress and motions *in limine*.[1]

Following this Court's decision in *Bailey v. United States*, __ U.S. __, 116 S. Ct. 501 (1995), Cleveland and

[1] Although Cleveland and Gray appealed the trial judge's adverse rulings on these motions to the First Circuit, these claims are not pursued in the instant petition.

Gray both challenged the imposition of penalties pursuant to 18 U.S.C. §924(c)(1).[2] The trial court judge agreed that a conviction could not be based on "use," as defined in *Bailey*, but held that a conviction could be sustained based on the "carry" prong of the statute. (App. 40a, 54a.)

The First Circuit agreed with the District Court. In so doing, the Court aligned itself with the "the Fourth, Seventh and Tenth Circuits [that] have held that a gun does not need to be readily accessible to be 'carried' in a vehicle." (App. 25a.) The Court acknowledged, however, "that the Second, Sixth and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible." (App. 26a.)

In reaching its holding, the First Circuit addressed the following two questions it considered unresolved by the Supreme Court's holding in *Bailey*: "First, must a firearm be on a suspect's person to be 'carried' or can one also 'carry' a firearm in a vehicle? Second, if one can 'carry' a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be 'carried.'" (App. 20a.)

In answer to the first of these questions, the First Circuit held that a weapon need not be carried on a suspect's person but can be carried in a vehicle. *Id.* The Court

[2] Gray, who attended his sentencing hearing, but against whom judgment had not yet entered at the time of the *Bailey* decision, sought relief *via* a Motion to Correct Sentence and/or for Other Appropriate Relief. Cleveland sought relief after his sentence was imposed pursuant to 28 U.S.C. § 2255.

explained that it had already held, in *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996), that weapon *could* be carried in a "conveyance" (in that case a boat) and that this holding resolved the issue for all vehicular carrying. *Id.*

On the second question, the First Circuit held that "a gun may be 'carried' in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported." (App. 21a.) In so doing, the court adopted a broad and inclusive definition of "carrying."

In reaching this result, the First Circuit reviewed the "ordinary or natural meaning" of "carry" looking to dictionary definitions of this term. *Webster's Third New International Dictionary of the English Language Unabridged* 343 (3d ed. 1971), the First Circuit notes, "defines 'carry' as, '1: to move while supporting (as in a vehicle or in one's hands or arms); move an appreciable distance without dragging: sustain as a burden or load and bring along to another place.'" (App. 23a.) The First Circuit cited another definition from *Webster's*, that provides:

> CARRY indicates moving to a location some distance away while supporting or maintaining off the ground. Orig. indicating movement by car or cart, it is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden.

Id. (abbreviations in original). The First Circuit concluded,

"This definition . . . clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition." *Id.*

The First Circuit rejected the *Black's Law Dictionary*'s more limited definition of "carry[ing] arms or weapons," that provides, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in the case of a conflict with another person." (App. 23a-24a.) (citing *Black's Law Dictionary* 214 (6th ed. 1990)). Judge Campbell explained:

> We strongly doubt -- given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle -- that Congress, in prescribing liability for anyone who "uses or carries" a firearm, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction. Hence the *Black's Law Dictionary* restricted definition of the phrase "carry arms or weapons" seems inapposite here.

Id. The Court concluded: "[W]e see no basis for holding that the guns' lack of instant accessibility precluded them from being 'carried[.]'" (App. 28a.)

REASONS FOR GRANTING THE PETITION

Petitioners seek the intervention of this Court to resolve a split among the Circuit Courts of Appeal regarding the scope of "carrying" a firearm within the meaning of 18 U.S.C. § 924(c)(1). Following this Court's unanimous decision in *Bailey v. United States*, 116 S. Ct. 501 (1995), federal trial and appellate courts have been called upon to reexamine the meaning of "carrying" in light of that opinion; these inquiries have yielded conflicting interpretations.

This circuit split impacts myriad cases. Section 924(c)(1) is charged in thousands of cases annually. The outcome of these cases should not depend, solely, on the circuit in which the charges were brought. The need for uniformity in federal law and federal law enforcement militates that the instant petition be granted. This is especially true given the severity of the punishment meted out pursuant to 18 U.S.C. § 924(c).

Finally, the First Circuit's interpretation conflicts with the language of § 924, as well as the reasoning and holding in *Bailey*. Section 924 establishes penalties for a wide range of criminal activity involving firearms. In its various subparts it imposes liability for, *inter alia*, using, carrying, possessing, transporting, transferring, smuggling, acquiring and importing firearms. The statutory language reflects congressional decision-making regarding the activity sought to be prohibited in the various sections of § 924. The judiciary should not override congressional intent by adopting a definition of "carry" that subsumes possession

and transportation, activities that Congress could have, but chose not to, prohibit in § 924(c).

Moreover, the decision below, in holding that weapons locked in the trunk of a vehicle were carried, expands the scope of carrying as far as any post-*Bailey* opinion to date and effectively deprives *Bailey* of meaning in all vehicular cases. Despite *Bailey*'s holding that § 924(c)(1) does not criminalize mere possession or storage of a firearm, 116 S. Ct. at 508, that is exactly what was criminalized in the case at bar. The backdoor approach should not prevail when access was appropriately denied through the front door.

I. The Circuit Courts of Appeal are Deeply Divided Over the Appropriate Scope of "Carrying" for the Purposes of 18 U.S.C. § 924(c)(1).

Post-*Bailey* decisions have taken widely variant approaches to "carrying" for the purposes of §924(c)(1). The schisms are most dramatic in cases involving weapons found in automobiles.[3] The existence of a circuit split over the

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[3] *Compare United States v. Giraldo*, 80 F.3d 667, 676 (2d. Cir.) (applying its holding that a gun must be within reach to be carried to vehicular cases), *cert. denied*, 117 S. Ct. 135 (1996); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.) (requiring a showing of "immediate accessibility" of a firearm to sustain a conviction for carrying a weapon in an automobile), *cert. denied*, 117 S. Ct. 136 (1996); *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.) (applying the requirement that a weapon must be on or about defendant's person, or immediately available for use to be carried in an automobile case), *cert. denied*, 117 S. Ct. 318 (1996); *United States v. Moore*, 104 F.3d 377, 380 (D.C. Cir. 1997) (holding that a firearm stowed in the engine

appropriate interpretation of the term "carry" has been widely noted. *See, e.g., United States v. Cooke*, 1997 WL 166290, at * 8 (7th Cir. Apr. 9, 1997) ("The circuits are split on the issue of whether a weapon that is aboard a moving vehicle must be immediately accessible to the defendant in order to support a 'carrying' conviction under § 924(c)(1)."); *Mitchell*, 104 F.3d at 653-54 (noting split among circuits); *United States v. Miller*, 84 F.3d 1244, 1259-60 (10th Cir.) (same) *cert. denied sub nom Hicks v. United States*, 117 S. Ct. 443 (1996); *Cleveland*, 106 F.3d at 1068 (same).

Some courts apply a "transportation and accessibility" test to establish whether a weapon is carried. Some courts require only accessibility. Other courts have held that a person can carry a weapon anywhere in car without regard to that weapon's accessibility. Several circuits contend that *Bailey* left undisturbed their pre-*Bailey* carrying case law. *United States v. Muscarello*, 106 F.3d 636, 638 (5th Cir. 1997); *Ruth*, 100 F.3d at 113; *United States v. Farris*, 77 F.3d 391, 395 n.4 (11th Cir.) *cert. denied,* 117 S. Ct. 241 (1996).

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compartment of a car was not carried); *with United States v. Cleveland*, 106 F.3d 1056, 1066 (1st Cir. 1997) (holding that a gun locked in the trunk of a car was carried); *United States v. Mitchell*, 104 F.3d 649, 653-54 (4th Cir. 1997) (holding that a firearm can be carried in an automobile without being immediately accessible); *United States v. Rivas*, 85 F.3d 193, 195 (5th Cir.) (holding that carrying is proved with evidence that a firearm is knowingly possessed in a vehicle), *cert. denied*, 117 S. Ct. 593 (1996); *United States v. Cooke*, 1997 WL 166290, at *7 (7th Cir. Apr. 9, 1997) (holding that possession and transportation of a weapon constitutes carrying); *United States v. Ruth*, 100 F.3d 111, 113 (10th Cir. 1996) (requiring possession and transportation to sustain a conviction for carrying in vehicular cases).

The Ninth, Sixth and Second Circuits, in post-*Bailey* cases, have adopted a test that requires a showing that a weapon is accessible, to support liability under §924(c).[4]

The Ninth Circuit takes the position that a firearm is carried, within the meaning of §924(c), where it is "easily accessible" to the driver of a vehicle, because, in such circumstances, it is "transported . . . within reach and immediately available for use." *United States v. Willett*, 90 F.3d 404, 407 (9th Cir. 1996). *See also United States v. Staples*, 85 F.3d 461, 464 (9th Cir.), *cert. denied*, 117 C. Ct. 318 (1996).[5] In reaching this conclusion, the Ninth Circuit looked to the "ordinary and natural meaning" of the term carry. *United States v. Hernandez*, 80 F.3d 1253, 1257 (9th Cir. 1996)). After reviewing the *Webster*'s and *Black*'s definitions looked to by the First Circuit, the Ninth Circuit concluded, "These definitions suggest that the term 'carry' involves activity beyond mere possession." *Id.* at 1258. Thus, the Court held, a weapon must be transported on or about a defendant's person and must have been immediately available for use to be carried. *Id.*

The Sixth Circuit also requires evidence of "immediate accessibility" and "transporting" of a firearm to

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[4] The D.C. Circuit and Eighth Circuit may also be aligning themselves with this position. *See* discussion *infra*.

[5] In *Staples*, the Court found that the defendant carried a firearm, within the meaning of §924(c)(1) where "the firearm was in the glove compartment, and thus 'about' his person, within reach and immediately available for use." 85 F.3d at 464.

support liability of carrying. *See United States v. Malcuit*, 104 F.3d 880, 885 (6th Cir. 1997); *United States v. Taylor*, 102 F.3d 767, 769 (6th Cir. 1996); *United States v. Moore*, 76 F.3d 111, 113 (6th Cir. 1996). In *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir.) *cert. denied*, 117 S. Ct. 136 (1996), the Sixth Circuit addressed carrying, in a case where the defendant was driving a car and had a firearm within reach. The Court wrote:

> [I]n order for a defendant to be convicted of carrying a gun in violation of section 924(c)(1), the firearm must be immediately available for use -- on the defendant or within his or her reach. Such availability takes the weapon beyond simple possession or storage. Here . . . the gun was visibly placed in the driver's side of the console and not, as in *Bailey*, locked in a trunk or in a footlocker located in a closet.

73 F.3d at 623. These cases indicate that a firearm located in the trunk of an automobile is not "carried" but, instead, is merely possessed or stored.

The Second Circuit too requires "'at least a showing that the gun [was] within reach during the commission of the drug offense' in order to sustain a conviction for carrying a firearm [under §924(c)]." *United States v. Santos*, 84 F.3d 43, 47 (2d Cir. 1996) (citations omitted), *modified*, 95 F.3d 116 (2d Cir. 1996). That Court explains, "We have recognized that '[n]either the legislative history of section 924(c)(1) nor case law in this circuit suggest[s] that the term

'carry' should be construed as having any meaning beyond its literal meaning.' Accordingly, we have construed that term narrowly[.]" 84 F.3d at 46-47 (citations omitted).

In two cases involving automobiles, the Second Circuit applied its accessibility test. In *United States v. Pimentel*, the court found ample evidence to support a conviction for "carrying" a firearm, where the gun in question was located in a compartment located on the back of the front passenger seat, and one of three confederates was seated in the back seat. 83 F.3d 55, 58-59 (2d Cir. 1996). In *United States v. Giraldo*, the court found that the evidence was "plainly insufficient" to convict a back seat occupant where "there was no evidence that he could have reached the gun in the cavity beneath the change dish from where he sat." 80 F.3d 667, 676 (2d Cir.), *cert. denied*, 117 S. Ct. 135 (1996). In contrast, there was sufficient evidence of "carrying" for a second defendant, where the "gun was within easy reach[.]" 80 F.3d at 677.

The D.C. Circuit's opinion in *United States v. Moore*, intimates that a weapon must be accessible to be "carried." 104 F.3d 377, 380 (D.C. Cir. 1997). In that case the court concluded, without discussion and with the agreement of the government, that evidence of a weapon stowed in the engine compartment of a car was insufficient to sustain liability for using or carrying a firearm under § 924(c)(1). *Id.*[6] This

[6] It is worthy of note that the ultimately successful dissenters to the D.C. Circuit's *en banc* opinion in *Bailey*, 36 F.3d 106, 120 (D.C. Cir. 1994) (Williams, Siberman and Buckley, J.J. dissenting) argued that immediate accessibility was required for "carrying." The dissenters

holding suggests that the D.C. Circuit may join ranks with the Second, Sixth and Ninth Circuits.[7]

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explained:

> [We] do not believe § 924(c) can properly be extended . . . [to a] defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, 18 U.S.C. § 924(b), that seems an improbable duplication. Rather, consonant with an active notion of "use," with Senate Report's example of a weapon carried in the defendant's pocket, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying the gun during and in relation to his possession with intent to distribute drugs.

36 F.3d at 125 (citations omitted).

[7] The Eighth Circuit may also be inclined toward this position. Although not expressly requiring accessibility, the Eighth Circuit has found carrying, in its opinions to date, only where a weapon has been accessible. Most recently the Eighth Circuit wrote, "We will assume, without deciding, that ready availability of the firearm is required for a 'carry' conviction in this Circuit." *United States v. Nelson*, 1997 WL 149200 (8th Cir. Apr. 2, 1997) (citing to its pre-*Bailey* decision in *United States v. Freisinger*, 937 F.2d 383, 388 n.4 (8th Cir. 1991)). That Circuit has also held that "the ordinary meaning of the word 'carry' includes transporting firearms in the *passenger compartment* of a car loaded with drugs." *United States v. Willis*, 89 F.3d 1371, 1378 (8th Cir.) (emphasis

In sharp contrast to the Second, Sixth and Ninth Circuits, the Fourth, Fifth, Tenth and now First Circuits do not require that a weapon be accessible to be carried within the meaning of § 924(c)(1).

The Fourth Circuit has rejected any accessibility requirement for "carrying." *United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997). That court explains: "the firearm placed in the trunk of the automobile for the journey to the transfer point is obviously being 'carried' under the plain meaning of that term, the firearm does not cease to be 'carried' simply because it is not readily accessible to the offender." *Id.* at 653-54. It is enough, the court concluded, that a defendant "knowingly possessed and transported the firearm in his automobile." *Id.* at 654.

The Tenth Circuit requires possession and transportation to sustain liability for carrying under § 924(c)(1). *United States v. Ruth*, 100 F.3d 111, 113 (10th Cir. 1996). That circuit has held that it sees "nothing in

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added), *cert. denied*, 117 S. Ct. 273 (1996). *See also United States v. Rhodenizer*, 106 F.3d 222 (8th Cir. 1997); *United States v. John R. Caldwell*, 97 F.3d. 1063, 1070 (8th Cir. 1996) (finding that a weapon was carried where it was located "in the hatchback portion of the Camaro, an area regarded (at least in case law) as generally within reach and available for use by the occupants of the car"); *United States v. White*, 81 F.3d 80, 83 (8th Cir. 1996) ("in order to sustain a conviction for 'carrying' a firearm . . . the government must prove that [the defendant] bore the firearm on or about his person during and in relation to a drug trafficking offense"); *United States v. Johnson*, 108 F.3d 919, 921 (8th Cir. 1997) (same). These decisions advert to a requirement that, even when transported in a vehicle, a weapon must be *accessible* to be "carried."

Bailey that conflicts with [its] pre-*Bailey* 'vehicular carrying' line of cases." *Id.* (citing *Miller*, 84 F.3d at 1260). These cases, "correctly interpreted, hold that the government is required to prove only that the defendant transported a firearm in a vehicle and that he had actual or constructive possession of the firearm while doing so." *Miller*, 84 F.3d at 1259. The Tenth Circuit has also clarified, however, that, following *Bailey* "neither storage nor possession of a gun, without more, satisfies the 'carry' prong of §924(c)(1)." *Ruth*, 100 F.3d at 113; *United States v. Spring*, 80 F.3d 1450, 1464 (10th Cir.), *cert. denied*, 117 S. Ct. 385 (1996).

Similarly, the Fifth Circuit, based on its pre-*Bailey* case law, requires only knowing possession of a firearm in a vehicle during and in relation to drug trafficking to sustain a conviction for carrying. *United States v. Muscarello*, 106 F.3d 636, 638 (5th Cir. 1997). In *United States v. Rivas*, the Fifth Circuit reviewed its precedent and noted:

> [W]e examined the "carrying" requirement of §924(c) and explained that the "word 'carry' derives from the French *carier*, which means 'to transport in a vehicle.' . . . Significantly, we also recognized that carrying on the person is different from carrying in a vehicle "because the means of carrying is the vehicle itself."

85 F.3d 193, 195 (5th Cir.), *cert. denied*, 117 S. Ct. 593 (1996). In *Muscarello*, this reasoning enabled a finding of carrying where the "pistol was in the glove compartment of [the defendant's] truck where it had been for a long period of

time[, arguably as a part of lawful employment.]" 106 F. 3d at 637.

Although the Seventh Circuit appeared to have taken a stance similar to that adopted by the First, Fourth, Fifth and Tenth Circuits -- that immediate accessibility was not required to support a finding of carrying in the vehicular context -- the most recent decision from that circuit indicates that this determination has not yet been made. In *United States v. Cooke*, the Seventh Circuit wrote:

> The circuits are split on the issue of whether a weapon that is aboard a moving vehicle must be immediately accessible to the defendant in order to support a "carrying" conviction under § 924(c)(1). This Circuit has not yet expressly held that such a showing is required.

1997 WL 166290, at * 8-9. The *Cooke* opinion backs off a position articulated in dicta in *United States v. Molina,* that, "Although in *Baker* we declined to decide whether the presence of a firearm and drugs in the trunk of a car would be sufficient for a conviction under § 924(c)(1), today we state that it would[.]" 102 F.3d 928, 932 (7th Cir. 1996) (referring to *United States v. Baker*, 78 F.3d 1241 (1996). Judge Wood, concurring in *Cooke*, wrote separately to explain her view of the current state of the law in the Seventh Circuit. She explains:

> Neither *Molina* nor Cooke's case presents facts that require us to resolve the question reserved in *Baker*. . . . It would be a considerable expansion of

§ 924(c)(1)'s "carrying" theory to hold that guns located in locked trunks, or in a suitcase located within the cargo hold of an airplane, were also "carried." We should take the same care in differentiating between "carrying" and mere possession as the Supreme Court required us to do with the analogous distinction between "use" and mere possession in [*Bailey*]. When we are presented with a case where the question of immediacy is squarely presented, it will be time enough to decide how direct access must be to satisfy the "carrying" language of § 924(c)(1).

1997 WL 166290, at *10. *But see Cooke*, 1997 WL 166290, at *10 ("I write separately because my colleagues' opinions leave the unfortunate impression that the validity of this court's very recent and very clear decision in [*Molina*] is somehow in question.") (Coffey, J., concurring). In sum, following *Cooke*, the Seventh Circuit appears to hold that carrying is defined as "to move while supporting: TRANSPORT[,]" *id.* at *6, but it is not clear whether immediate accessibility is also required.

The Eleventh Circuit, in *United States v. Farris*, while maintaining that pre-*Bailey* cases govern, did not articulate its own view of the scope of those cases. 77 F.3d 391, 395, 395 n.4 (11th Cir.), *cert. denied*, 117 S. Ct. 241 (1996). The Court found only that there was sufficient evidence that an automobile was "used as a drug distribution center" and that the defendant knew of the gun in the glove compartment. *Id.* at 395. "Put differently, [the court wrote,] the jury could find that the firearm was being carried by [the

defendant] in the vehicle." *Id.* at 395-396.

In sum, the post-*Bailey* case law from the Second, Sixth, Ninth, D.C. and, possibly, Eighth Circuits supports the position that the petitioners *did not* "carry" a weapon in violation of §924(c). Therefore, if petitioners had been prosecuted in any of these circuits, they would have been found not guilty of "carrying" a weapon.

The First Circuit has held that the petitioners *did* carry weapons in violation of § 924(c)(1), despite the fact that the weapons in question were inaccessible and located in the locked trunk of their car. It appears that the Fourth, Fifth, Tenth, Eleventh and, possibly, Seventh Circuits would likely agree, although based on differing analyses and, in several circuits, based solely on *their* pre-*Bailey* carrying case law.

The circuit split on this issue has fully evolved and requires the intervention of this Court for its resolution.

II. Federal Trial Courts are Flooded with Cases Raising This Important Issue.

The importance of the issue presented in the instant petition is magnified by the fact that federal trial and appellate courts apply § 924(c)(1) thousands of times each year. Since *Bailey* was decided over 120 cases presenting questions about the scope of "carrying" for the purposes of §924(c)(1) have been decided and reported by federal district and appellate courts.

A study of federal firearm-related offenses indicates that of the nearly 7,000 federal sentences for firearms offenses in fiscal year 1993, 82% of those sentenced had "used or carried" a firearm during another crime. U.S. Dept. of Justice, *Federal Firearms-Related Offenses*, Bureau of Justice Statistics, NCJ-148950 (June 1995). Although not all of these convictions may have been pursuant to § 924(c)(1), one report based on information from the U.S. Sentencing Commission states that 1,973 people were sentenced for conviction of a violation of § 924(c)(1) in the fiscal year ending September 30, 1995. Frank J. Murray, *Mandatory 5-year Sentence for Gun Use Curbed by Court*, Washington Times, Dec. 7, 1995, at A-6.

Moreover, following *Bailey*'s narrowing of the scope of use, it can be expected that § 924(c)(1) cases will increasingly allege violation of the carrying provision of the statute.

This Court should resolve the circuit split sooner rather than later to reduce the ultimate burden on the lower courts. Once the scope of carrying is clarified, cases now being decided may require reconsideration by the lower courts. Where, as here, the split is well developed by the lower appellate courts, this Court should step in to avoid continued uncertainty over the state of the law.

III. The First Circuit's Decision Conflicts with the Language and Legislative History of Section 924, as well as with the Reasoning and Holding of This Court's Opinion in Bailey and is Erroneous.

The First Circuit's holding in the petitioners' case conflicts with the language of § 924, as well as the reasoning of this Court in *Bailey*.

The language and structure of § 924 support a tailored definition of "carry." Section 924 addresses a broad spectrum of firearms-related activity including using, carrying, possessing, transporting, transferring, smuggling, acquiring and importing firearms. Subsection 924(c)(1) however, addresses *only* using and carrying. The statutory language reflects congressial decision-making regarding the activity it sought to prohibit in the various subsections of § 924. The judiciary should not override congressional intent by adopting a definition of "carry" that subsumes possession and transportation, activities that Congress could have, but chose not to, prohbit in § 924(c). "Carry" should be accorded the same careful construction that this Court undertook in defining "use" in *Bailey*.

The legislative history of § 924(c) undercuts the reasoning the First Circuit used in rejecting a tailored definition of "carry." In evaluating the "plain meaning" of the term "carry" the First Circuit rejected the *Black's Law Dictionary* definition of "carry arms or weapons," that provides, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive

action in the case of a conflict with another person." (App.23a-24a.) (citing *Black's Law Dictionary* 214 (6th ed. 1990)). The First Circuit dismissed this definition, stating

> We strongly doubt -- given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle -- that Congress, in prescribing liability for anyone who "uses or carries" a firearm, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction.

Id. However, section 924(c) was initially enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224, and prohibited using or carrying a firearm "*during the commission of any felony which may be prosecuted in a court of the United States*," *id.* (emphasis added). It was not until the passage of the Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 104, 100 Stat. 449, 457, that Congress expanded the reach of section 924(c) to include "crime[s] of violence" and "drug trafficking offense[s]." *Id.* Consequently, contrary to the First Circuit's ruminations, Congress likely was not considering "the omnipresence of automobiles in today's world and in drug dealing" when it used the word "carry" in drafting § 924(c), because drug trafficking offenses were added to the statute *eighteen (18) years* after the word "carry" was chosen by Congress.

In any event, although *Bailey* did not reach the scope of the "carry" prong of §924(c), its discussion provides guidance regarding the appropriate contours of liability for "carrying." This guidance falls in line with the more tailored *Black's* definition of carrying arms or weapons. *Bailey* substantially limited the scope of use for the purposes of § 924(c)(1). In holding that "use" required a showing of "active employment," this Court stated that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense." *Bailey*, 116 S. Ct. at 506. This Court also held that "use" did not encompass "intended use, as when an offender places a firearm with the intent to use it later if necessary." *Id.* at 507. *Bailey* emphasized: "Had Congress intended possession alone to trigger liability under §924(c)(1), it easily could have so provided. This obvious conclusion is supported by the frequent use of the term 'possess' in the gun-crime statutes to describe prohibited gun-related conduct." *Id.* at 506.

The First Circuit's holding in petitioners' case sidesteps these limitations imposed by *Bailey*. The First Circuit simply expands the definition of "carrying" to include much of what was prohibited as "use" in *Bailey* -- that is, possession, storage and placement for future use -- and runs counter to the analysis in *Bailey*.

Bailey provides instruction regarding activities constituting, and not constituting, carrying. *Bailey* addresses ways in which "use" differs from "carrying" in the context of §924(c)(1). The Court reviewed the statutory language and assessed its import:

> Congress has specified two types of conduct with a firearm: "uses" or "carries." . . . We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning. While a broad reading of "use" undermines virtually any function for "carry," a more limited, active interpretation of "use" preserves a meaningful role for "carries" as an alternative basis for a charge. Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

Bailey, 116 S. Ct. at 507. From this discussion, one learns that carrying can be found where a firearm is handled, or when a weapon is located on a person's body or in his or her clothing. This discussion also elucidates some of what carrying *is not*: carrying *is not* having a gun on display, or bartering with a firearm without handling it.

The broad interpretation of "carry" articulated by the First Circuit is invalid for exactly the same reasons as this Court invalidated a broad interpretation of "use" in *Bailey*. This Court reasoned that a broad interpretation of "use" would "swallow up any significance for 'carry.'" 116 S. Ct. at 508. This Court continued, "If Congress had intended to deprive 'use' of its active connotations, it could have simply

substituted a more appropriate term -- 'possession' -- to cover the conduct it wished to reach." *Id.* Similarly, to expand "carry" to reach all possession would vitiate any independent meaning for "use" in the vehicular context. The First Circuit's holding would extend the reach of § 924(c)(1) to instances of simple possession or storage and placement of a firearm for future use -- liability squarely rejected in *Bailey*. The Court's careful analysis and its holding in *Bailey* would be dramatically undercut if "carry" were expanded to cover this broad terrain.

In conclusion, this court *has* provided meaningful guidance regarding the appropriate scope of carrying pursuant to § 924(c)(1). Some courts have acknowledged and responded to the limitations suggested by *Bailey*. *See, e.g., Malcuit*, 104 F.3d at 886 ("*Bailey* . . . significantly changed the § 924(c)(1) analysis from that previously employed by this court"). Other courts, including the First Circuit, have decided cases in a manner that conflicts with the language and analysis of *Bailey*. Still other courts have simply held that *Bailey* did not change their carrying law and have ignored the dramatic implications of that case for carrying liability. *See, e.g., Muscarello*, 106 F.3d at 638. This court should speak to resolve the circuit conflict and unify the federal law vis-a-vis this statutory provision.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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April 1997

APPENDIX

UNITED STATES of America, Appellee,
v.
Donald E. CLEVELAND, Defendant, Appellant.
UNITED STATES of America, Appellee,
v.
Ramon E. VASQUEZ, Defendant, Appellant.
UNITED STATES of America, Appellee,
v.
Enrique GRAY-SANTANA, Defendant, Appellant.
Nos. 96-1043, 96-1669, 96-1128 and 96-1659.

United States Court of Appeals,
First Circuit.
Heard Dec. 6, 1996.
Decided Feb. 18, 1997.

Following jury trial, first defendant was convicted in the United States District Court for the District of Massachusetts, Robert E. Keeton, J. of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute. Codefendants pleaded guilty to attempting to possess cocaine with intent to distribute and to carrying or using firearm during and in relation to drug trafficking crime. All defendants appealed. The Court of Appeals, Campbell, Senior Circuit Judge, held that: (1) police had probable cause to arrest first defendant at time he was ordered from automobile, such that search of defendant's person was proper; (2) district court's reasonable doubt instruction was proper; (3) police had probable cause to search vehicle occupied by second and third defendants; (4) second defendant's statement to law enforcement agent following arrest was voluntary; and (5) placement of firearms in trunk of defendants' automobile was sufficient to support conviction for "carrying" firearm during and in relation to drug trafficking crime.

Affirmed.

Inga S. Bernstein and *John H. Cunha*, Boston, MA, by Appointment of the Court, with whom *Norman S. Zalkind*, Zalkind, Rodriguez, Lunt & Duncan and Salsberg, Cunha & Holcomb, P.C. were on consolidated briefs, for defendants-appellants Enrique Gray-Santana and Donald E. Cleveland.

Oliver C. Mitchell, Jr., Boston, MA, with whom *Donnalyn B. Lynch Kahn* and Goldstein & Manello, P.C. were on brief for defendant-appellant Ramon E. Vasquez.

Andrea Nervi Ward, Assistant United States Attorney, Boston, MA, with whom *Donald K. Stern*, United States Attorney, was on briefs, for the United States.

Before BOUDIN, Circuit Judge, CAMPBELL, Senior Circuit Judge, and BOWNES, Senior Circuit Judge.

CAMPBELL, Senior Circuit Judge.

Ramon E. Vasquez appeals from his conviction by a jury for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846 and for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841. He contends that the district court erred in denying his motion to suppress certain physical evidence and in omitting "hesitate to act" language from its reasonable doubt instruction.

Enrique Gray-Santana and Donald Cleveland, who were Vasquez's co-defendants, pleaded guilty to attempting to possess cocaine with intent to distribute in violation of 21

U.S.C. §§ 846 and 841(a) and to carrying or using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). As their guilty pleas permit, they now appeal from the district court's denials of their motions to suppress and motions in limine. They also appeal from the district court's denial of relief from their s 924(c)(1) convictions for carrying or using a firearm in relation to a drug crime. They argue that their guilty pleas and convictions should be invalidated under *Bailey v. United States*, --- U.S. ----, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), a decision handed down by the Supreme Court shortly after acceptance of their guilty pleas.

I. Background

Most of the facts are not in dispute. Gray-Santana ("Gray"), a resident of New York City, arranged to secure five to eight kilograms of cocaine from co- defendant Juan Rodriguez (not a present appellant). Gray intended to sell the cocaine through other contacts he had in Boston, so he arranged to take delivery in Boston.

On the morning of October 18, 1994, Gray travelled by bus to Boston, planning to meet Cleveland. Cleveland picked Gray up in a rented white Mazda 929 he had borrowed from a friend and took him to his house. There, Cleveland and Gray placed three loaded handguns inside a Louis Vuitton duffel bag and put the bag inside the Mazda's trunk. The two planned to use the guns to rob their suppliers of their cocaine. At around 4 p.m., Cleveland and Gray were paged by Rodriguez. They then left in the Mazda to meet Rodriguez in the Symphony Hall area of Boston.

At this time, the Drug Enforcement Administration

was investigating one Juan Pagan. The DEA had information that Pagan was shipping large amounts of cocaine from Puerto Rico to New England. On October 17, 1994, heightened phone activity led DEA Agents to begin physical surveillance, including videotaping, of the Connecticut apartment complex where Juan Pagan resided. Around noon on October 18, 1994, two cars arrived at the complex. The first was a Lexus, driven by William Acosta with Vasquez in the back seat. The second was a Lincoln, driven by Rodriguez.

After the cars parked, Rodriguez handed Acosta a black bag and then Acosta took the bag up to Pagan's apartment. Vasquez, carrying a cellular phone, got out of the Lexus and sat with Rodriguez in the Lincoln. After ten or fifteen minutes, Acosta came back and spoke to Vasquez, prompting Vasquez and Rodriguez to leave the complex in a brown Oldsmobile driven by one Jorge Quinones. An hour or so later, Vasquez returned in the Oldsmobile, followed by Rodriguez in a white Isuzu Trooper.

The DEA had received information from two confidential sources that Pagan used a white Isuzu Trooper in his drug operations. These informants had also told the DEA that some of Pagan's vehicles had hidden compartments used to hold drugs. One of the informants had stated that Pagan's white Isuzu Trooper had such a hidden compartment under the rear seat.

After the Isuzu arrived, Acosta and Rodriguez were observed examining its back seat area. Acosta then left, driving the Lexus with Vasquez in the back seat. Rodriguez followed them in the Isuzu. The two cars drove to Boston on major highways, staying close to 55 miles per hour. DEA

agents followed them the entire way.

After the caravan arrived in the Symphony Hall area of Boston, Acosta, and Rodriguez parked the cars. Acosta then used the Lexus to guide Cleveland and Gray, who had arrived in the Mazda, to where the Isuzu was parked. Acosta drove away, and Vasquez was next observed sitting in the back seat of the Mazda. Gray exited the Mazda and got into the Isuzu. Vasquez got into the front seat of the Mazda. The two cars began to drive off. At this point, the DEA agents blocked them. The agents ordered the occupants of both cars to exit their vehicles and handcuffed them. The agents then moved the suspects and their cars out of traffic to a nearby parking lot.

The agents searched the Isuzu and found six kilograms of cocaine in a concealed compartment underneath the back seat. They then searched the Mazda and found the bag in the trunk containing the three guns, rope and duct tape. At that point, the four men were told they were under arrest.

A few hours after his arrest, while he was in custody, Gray gave a statement to DEA agent Bruce Travers confessing to participation in the events described above.

Vasquez filed a motion to suppress the physical evidence found on his person at the time of his arrest. The district court denied his motion. Vasquez was tried by a jury and convicted of conspiracy to possess cocaine with intent to distribute and of possession of cocaine with intent to distribute. The court sentenced him to 121 months in prison.

Cleveland and Gray eventually pled guilty to

attempting to possess cocaine with intent to distribute and to carrying or using a firearm during and in relation to a drug trafficking crime, subject to their right to appeal any adverse ruling by the district court on their motions to suppress physical evidence and to suppress Gray's post-arrest statement. The district court denied their motions and sentenced each of them to 180 months in prison and 60 months of supervised release.[1] After the Supreme Court came down with its Bailey decision, --- U.S. ----, 116 S.Ct. 501, 133 L.Ed.2d 472, Cleveland and Gray moved in the district court for relief from the conviction for carrying or using a firearm in relation to a drug trafficking crime. The court denied that motion.

II. Vasquez

A. The Search of Vasquez's Person:

In his first point of error, Vasquez argues that the district court erred in denying his motion to suppress the physical evidence the agents found on his person. This included a pager, address book, business cards, and notes tying Vasquez to the other defendants. He contends that a wrongful de facto arrest occurred when he was initially ordered out of the Mazda and handcuffed. (Only later was Vasquez told he was under arrest and thereafter searched, by which time the cocaine had been discovered in the Isuzu.) Because the initial de facto arrest was allegedly without probable cause, Vasquez argues that it was illegal and that it

[1] Rodriguez pleaded guilty to conspiracy and possession charges and was also sentenced to 120 months in prison and 60 months of supervised release.

tainted all subsequent events, causing the later search of his person to violate the Fourth Amendment.

The district court held, however, and we agree, that the agents had probable cause to arrest Vasquez at the time they ordered him out of the Mazda and handcuffed him. Accordingly, regardless of whether the arrest occurred then or later, the arrest was legal and the subsequent search of his person was proper. "[I]t is well established that '[i]f an arrest is lawful, the arresting officers are entitled to search the individual apprehended pursuant to that arrest.' " *United States v. Torres-Maldonado*, 14 F.3d 95, 105 (1st Cir.) (quoting *United States v. Uricoechea-Casallas*, 946 F.2d 162, 165 (1st Cir.1991)), *cert. denied*, --- U.S. ----, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994).

"Law enforcement officers may effect warrantless arrests provided that they have probable cause to believe that the suspect has committed or is committing a crime." *United States v. Martinez-Molina*, 64 F.3d 719, 726 (1st Cir.1995) (citing *United States v. Watson*, 423 U.S. 411, 416-18, 96 S.Ct. 820, 824-25, 46 L.Ed.2d 598 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 113-14, 95 S.Ct. 854, 862-63, 43 L.Ed.2d 54 (1975)). "[The government] need only show that, at the time of the arrest, the facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense." *Torres- Maldonado*, 14 F.3d at 105. See also *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225-26, 13 L.Ed.2d 142 (1964).

"Of course, probable cause must exist with respect to each person arrested, and 'a person's mere propinquity to others independently suspected of criminal activity does not,

without more, give rise to probable cause to search that person.' " *Martinez-Molina*, 64 F.3d at 726 (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979)). "[C]ases in which courts find that probable cause exists generally involve substantially more than a momentary, random, or apparently innocent association between the defendant and the known criminal activity." *Martinez-Molina*, 64 F.3d at 727 (discussing cases).

Here, prior to seizing Vasquez, the agents had been investigating Pagan and his drug trafficking operations for several years. Before the events of this case, the agents had learned from informants that Pagan was trafficking in kilogram quantities of cocaine, shipping it from Puerto Rico to Hartford, Connecticut and Springfield, Massachusetts. The agents had learned that Pagan used couriers to transport the cocaine. Some of Pagan's couriers had been arrested at the San Juan airport with several kilograms of cocaine in their luggage and had admitted to working for Pagan.

Two confidential informants who had each proved reliable in related matters had told DEA agents that among the many vehicles Pagan used to transport drugs and money was a white Isuzu Trooper. They each also related that Pagan's transport vehicles often had a concealed, electronically-controlled compartment used to hide whatever was being moved. One of them asserted that he had seen that the white Isuzu Trooper had such a compartment in the floor under the rear seat.

The agents had also learned from one of the informants and from other sources that Pagan's girlfriend lived in apartment D-219 at the Connecticut apartment complex and that Pagan used that apartment in his drug

activities. The apartment was listed under the name "J. Pagan." The DEA had installed a pen register on the apartment's phone so they could track calls made to and from that number.

On October 17, 1994, the pen register revealed a sharp increase in phone activity from the Connecticut apartment. Some of the numbers being called matched cellular phone and beeper numbers that the agents knew belonged to Pagan's previously identified drug associates. The agents decided to begin physical surveillance of the Connecticut apartment. This surveillance included agents stationed around the apartment complex and two agents who were equipped with a video camera in an apartment that had a view of Pagan's apartment.

A little after noon on October 18th, the agents observed a Lexus and a Lincoln Town Car enter the apartment's parking lot. The various movements of people and vehicles that followed, coupled with the DEA's information about Pagan's drug dealing, strongly indicated that a drug transaction was taking place. Acosta, who had been driving the Lexus, entered Pagan's apartment building followed by Rodriguez, carrying a large black shoulder bag. Rodriguez handed this bag to Acosta in the building's lobby. Later on, the agents saw Acosta talking to Pagan on Pagan's balcony.

Vasquez exited the Lexus and walked over to Rodriguez and the Lincoln carrying a cellular phone, one of the "well known tools of the drug trade." *United States v. De La Cruz*, 996 F.2d 1307, 1311 (1st Cir.), *cert. denied*, 510 U.S. 936, 114 S.Ct. 356, 126 L.Ed.2d 320 (1993). *See also Martinez-Molina*, 64 F.3d at 728. Vasquez waited with

Rodriguez inside the Lincoln until Acosta came out with another man, Jorge Quinones, and spoke to Vasquez. Then Quinones left, returning shortly in a brown Oldsmobile. Vasquez and Rodriguez got into the Oldsmobile and drove out of the complex.

An hour or so later Vasquez and Quinones returned, followed by Rodriguez in a white Isuzu Trooper, exactly the car the agents had been told Pagan used to transport drugs and drug proceeds. It was also the vehicle said to have a hidden compartment for drugs and money in the floor under the rear seat. While Pagan stood on his balcony overlooking the parking lot, Acosta and Rodriguez were seen to be looking into the Isuzu's back seat area, where the secret compartment was said to be located.

At this point, the agents had probable cause to believe that Vasquez, Rodriguez, Acosta, Pagan, and Quinones were involved in a drug transaction, with the Isuzu Trooper likely bearing the contraband. Rather than arrest the suspects immediately, the agents chose to follow the Isuzu Trooper and the Lexus as they drove to Boston.

What happened thereafter--beginning with the drive in tandem to Boston and ending with the agents' intervention--was wholly consistent with the existence of an unfolding drug transaction and Vasquez's active involvement. Vasquez and Rodriguez stood on a Boston street corner, apparently checking the area for police. Later, and after the agents had seen Acosta speak to Cleveland and Gray, the agents spotted Vasquez inside the Mazda, to which he had moved from the Lexus. Vasquez was still inside the Mazda with Cleveland when the agents stopped the vehicles and ordered everyone out.

By this time, the agents had abundant evidence to constitute probable cause that Vasquez was involved in an ongoing drug trafficking crime and that his association with the other suspects was not momentary, random, or innocent. They had authority, therefore, at the time he was ordered from the Mazda and handcuffed, to arrest Vasquez. The district court did not err in refusing to suppress the various items later found on Vasquez's person when he was searched.

B. The Reasonable Doubt Instruction:

Vasquez asserts that the district court erred in refusing to include "hesitate to act" language in its reasonable doubt instruction. In particular, Vasquez insists that, upon his objection to the omission, the court should have complied with his request to tell the jury, "When we talk about a reasonable doubt, we mean a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act."

The short answer to this argument is that this court has explicitly held that a district court's refusal to include "hesitate to act" language in its explanation of reasonable doubt to the jury does not constitute reversible error. *See United States v. Vavlitis*, 9 F.3d 206, 212 (1st Cir.1993); *United States v. O'Brien*, 972 F.2d 12, 15 (1st Cir.1992). Although we accepted an instruction that included such language in *United States v. Drake*, 673 F.2d 15, 21 (1st Cir.1982), we have also criticized the "hesitate to act" formulation. *See Gilday v. Callahan*, 59 F.3d 257, 264 (1st Cir.1995) (characterizing the "hesitate to act" language as "arguably unhelpful"), *cert. denied*, --- U.S. ----, 116 S.Ct. 1269, 134 L.Ed.2d 216 (1996); *O'Brien*, 972 F.2d at 15-16 (criticizing instructions such as the "hesitate to act"

formulation which compare reasonable doubt to the decisional standard used by individual jurors in their own affairs as trivializing the constitutionally required burden of proof).

The Supreme Court has stated that the Constitution does not require district courts to define reasonable doubt, nor does it require trial courts who do choose to explain the term to employ "any particular form of words ... in advising the jury of the government's burden of proof." *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994). "Rather, 'taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.'" *Id.* (quoting *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 138, 99 L.Ed. 150 (1954)).

In instructing the jury on reasonable doubt, the district court stated:

> As I have said, the burden is upon the Government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt. A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence.
>
> Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors

cannot say that they have a settled conviction of the truth of the charge.

> Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions--one that a defendant is guilty as charged, the other that the defendant is not guilty--you will find the defendant not guilty.
>
> It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.
>
> Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable

doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

This explanation correctly conveyed the concept of reasonable doubt to the jury.

III. Cleveland and Gray

A. The Vehicle Searches:

In their first point of error, Cleveland and Gray argue that the district court erred in refusing to grant their motion to suppress the evidence found in the agents' search of the Isuzu Trooper and of the Mazda.

"A police officer may effect a warrantless search of the interior of a motor vehicle on a public thoroughfare as long as he has probable cause to believe that the vehicle contains contraband or other evidence of criminal activity." *United States v. Staula*, 80 F.3d 596, 602 (1st Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 156, 136 L.Ed.2d 101 (1996). *See also California v. Acevedo*, 500 U.S. 565, 570, 111 S.Ct. 1982, 1986, 114 L.Ed.2d 619 (1991); *Chambers v. Maroney*, 399 U.S. 42, 46-52, 90 S.Ct. 1975, 1978- 82, 26 L.Ed.2d 419 (1970); *United States v. Martinez-Molina*, 64 F.3d 719, 730 (1st Cir.1995). When the police have probable cause to search a vehicle, they may also search closed containers within that vehicle. *See Acevedo*, 500 U.S. at 569-81, 111 S.Ct. at 1985-92.

Even assuming that Cleveland and Gray have standing to contest the searches in this case, a problematic

proposition in itself, the agents clearly had probable cause to search the vehicles. As explained in Part II-A, above, by the time the agents stopped the two cars, they had probable cause to believe that the defendants were involved in a drug transaction and that the Trooper contained contraband. The movements of the Mazda in following the Lexus to rendezvous with the Isuzu, when combined with the exchange of personnel--Gray moving into the Isuzu and Vasquez entering the Mazda--provided the agents with probable cause to believe that Cleveland and Gray were also involved in the drug transaction and that the Mazda contained contraband. The warrantless search thus did not violate the Fourth Amendment, and the district court did not err in refusing to suppress the evidence found in the two vehicles.

B. Gray's Statement:

In the next point of error, Gray asserts that the district court should have suppressed the statement he made to Agent Travers in the DEA office after his arrest. Gray claims that he had invoked his right to counsel before making the statement and that the agents coerced the statement from him through intimidation.

The district court, after holding two evidentiary hearings at which it heard the testimony of Gray, Agent Travers, and another agent present at DEA headquarters the night of Gray's arrest, concluded that Gray's various allegations of coercive activity by the agents were not credible. The court also found that Gray had initiated the conversation with the agents that led to his confession by knocking on the door of his cell. Gray then told Agent Travers that he wished to speak with him about the events

leading up to his arrest and signed a written waiver of his rights. After examining the record, we believe that these findings of fact by the district court were not clearly erroneous. *See United States v. Valle*, 72 F.3d 210, 213-14 (1st Cir.1995) ("In reviewing orders granting or denying suppression motions, this court scrutinizes a district court's factual findings, including its credibility determinations, for traces of clear error.").

In this case, as in *Valle*, "whether or not to suppress the challenged statements boils down to a credibility call" and "[s]uch calls are grist for the district court's mill." *Valle*, 72 F.3d at 214. Since Gray initiated the contact with the agents that led to his statement after he had invoked his right to counsel, the district court was correct to deny the motion to suppress. *See Edwards v. Arizona*, 451 U.S. 477, 484-86, 101 S.Ct. 1880, 1884-86, 68 L.Ed.2d 378 (1981) (holding that once a defendant has asked for an attorney, she is not subject to further interrogation by the police until after counsel has been made available to her unless she herself initiates further communication with the authorities); *United States v. Fontana*, 948 F.2d 796, 805-06 (1st Cir.1991) (noting that initiation of interrogation by the accused has been broadly interpreted); *Watkins v. Callahan*, 724 F.2d 1038, 1042 (1st Cir.1984) (stating that "an accused is not powerless to countermand an election to talk to counsel").

Similarly, we find no clear error in the district court's determination that the agents did not commit the coercive acts alleged by Gray. *See United States v. Burns*, 15 F.3d 211, 216 (1st Cir.1994) ("Although the ultimate issue of voluntariness is a question of law subject to plenary review, we will accept the district court's subsidiary findings of fact unless they are 'clearly erroneous.' ").

Based on the facts as found by the district court, the court's holding that Gray's statement was voluntary and therefore admissible at trial under 18 U.S.C. § 3501 was proper.

The court applied the totality of the circumstances test mandated by 18 U.S.C. § 3501(b), paying particular attention to the factors identified by that section.[2] Gray gave his statement within six hours of his arrest, bringing this case within the rule of § 3501(c).[3] The court found that Gray

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[2] 18 U.S.C. § 3501(b) states:

> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

[3] 18 U.S.C. § 3501(c) states, in relevant part:

> (c) In any criminal prosecution by the United States ... a confession made or given by a person who

knew the nature of the offense of which he was suspected at the time he made the confession; knew that he was not required to make any statement and that any statement he did make could be used against him; and had been advised prior to the questioning of his right to the assistance of counsel. The court acknowledged that Gray had been without the assistance of counsel when he gave his statement, but held that in this case, this fifth factor was heavily outweighed by the other four factors and by the case's particular circumstances.

We agree with the district court that Gray's statement was voluntary.

C. The "Carry" Issue:

Cleveland and Gray pleaded guilty to violating 18 U.S.C. § 924(c)(1). That statute imposes a five-year prison term on anyone who, "during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm." 18 U.S.C. § 924(c)(1). After the Supreme Court's opinion in *Bailey*, they both sought revocation of their convictions based on guilty pleas to the § 924(c)(1) charges. Gray, against whom judgment had not yet entered, filed an unsuccessful Motion to Correct Sentence under Fed.R.Crim.P. 35(c), and Cleveland, against whom judgment had entered and whose direct appeal was already pending, filed an equally unavailing motion under 28 U.S.C. § 2255.

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is a defendant therein, while such person was under arrest ... shall not be inadmissible solely because of delay in bringing such person before a magistrate ... if such confession was made or given by such person within six hours immediately following his arrest or other detention....

The various appeals were consolidated. The government does not dispute our jurisdiction to consider on the merits Cleveland and Gray's claims that their guilty pleas are invalid in light of Bailey. Since we reject those claims, we do not address any potential jurisdictional question stemming from Cleveland's § 2255 appeal.

The broad definition of "use" formerly employed by this circuit and under which Cleveland and Gray pleaded guilty was unanimously disapproved by the Supreme Court in *Bailey*. Stating the need to interpret statutory terms in accordance with their "ordinary or natural" meaning, the Court relied on the dictionary definition of "use" in holding that a conviction under the "use" prong of the statute could only be upheld if the defendant "actively employed the firearm during and in relation to the predicate crime." *Bailey*, --- U.S. at ---- - ----, 116 S.Ct. at 506-09. Mere possession or storage of the weapon is insufficient. *Id.* at ---- - ----, 116 S.Ct. at 508-09.

Under *Bailey*, Cleveland and Gray cannot be convicted under § 924(c)' s "use" prong. The guns remained in the Mazda's trunk throughout the events in question; neither Cleveland nor Gray "actively employed" the firearm. Their guilty pleas might still, however, be upheld under the statute's "carry" prong.

While *Bailey* did not address the requirements relative to "carry," the Supreme Court stated that part of its rationale for defining "use" more narrowly was to preserve a separate, nonsuperfluous meaning for "carry." *Bailey*, --- U.S. at ----, 116 S.Ct. at 507. The Court wrote, "Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on

display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction." *Id.* at ----, 116 S.Ct. at 507. The Court remanded the case for a determination of whether a defendant could be convicted under the "carry" prong either for having a gun inside a bag in a locked car trunk or for having an unloaded firearm in a locked footlocker inside a bedroom closet. *Id.* at ----, 116 S.Ct. at 509.

Bailey leaves us with two questions concerning the proper interpretation of "carry." First, must a firearm be on a suspect's person to be "carried" or can one also "carry" a firearm in a vehicle? Second, if one can "carry" a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be "carried"?

The first question is easily answered. We have already held post-*Bailey* that a firearm can be "carried" in a boat, a conveyance that seems indistinguishable for present purposes from a land vehicle like a car. *United States v. Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 405, 136 L.Ed.2d 319 (1996).

This result accords both with our pre-*Bailey* "carry" cases and with the holdings of the other circuits to have considered this issue post-*Bailey*. *See, e.g.*, *United States v. Plummer*, 964 F.2d 1251, 1252-54 (1st Cir.) (acknowledging the defendant-driver's concession that the presence of a gun in his vehicle either in the driver's seat or on the front passenger seat was sufficient to establish that he had "carried" a gun under § 924(c)(1)), *cert. denied*, 506 U.S. 926, 113 S.Ct. 350, 121 L.Ed.2d 265 (1992); *United States v. Eaton*, 890 F.2d 511, 511-12 (1st Cir.1989)

(acknowledging the defendant's concession that he had "carried" a gun for the purposes of § 924(c)(1) when the gun had been under the front seat of the truck he was driving), *cert. denied*, 495 U.S. 906, 110 S.Ct. 1927, 109 L.Ed.2d 291 (1990); *United States v. Giraldo*, 80 F.3d 667, 677-78 (2d Cir.) (upholding a § 924(c)(1) conviction for "carrying" a gun in a car), *cert. denied*, --- U.S. ----, 117 S.Ct. 135, 136 L.Ed.2d 83 (1996); *United States v. Mitchell*, 104 F.3d 649, 652-54 (4th Cir. 1997) (same); *United States v. Fike*, 82 F.3d 1315, 1327-28 (5th Cir.) (stating that a gun may be "carried" in a car), *cert. denied*, --- U.S. ---- - ----, 117 S.Ct. 241-42, 136 L.Ed.2d 170 (1996); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 136, 136 L.Ed.2d 84 (1996); *United States v. Molina*, 102 F.3d 928, 930-32 (7th Cir.1996) (same); *United States v. Willis*, 89 F.3d 1371, 1377-79 (8th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996); *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 318, 136 L.Ed.2d 233 (1996); *United States v. Miller*, 84 F.3d 1244, 1256-61 (10th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 443, 136 L.Ed.2d 339 (1996); *United States v. Farris*, 77 F.3d 391, 395 (11th Cir.) (upholding a s 924(c)(1) conviction for "carrying" a gun in a car), *cert. denied*, --- U.S. ----, 117 S.Ct. 241, 136 L.Ed.2d 170 (1996).

On the second question, we agree with the Fourth, Seventh and Tenth Circuits that a gun may be "carried" in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant while it is being transported. *See Miller*, 84 F.3d at 1260; *Molina*, 102 F.3d at 930-32; *Mitchell*, 104 F.3d at 652-53.

Since *Bailey*, this Circuit has twice faced questions

concerning the scope of the statute's "carry" prong. In *United States v. Manning*, 79 F.3d 212 (1st Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 147, 136 L.Ed.2d 93 (1996), we held that carrying a briefcase containing a gun, pipe bombs, drugs, and drug paraphernalia was sufficient to fulfill the "carry" requirement. In *Ramirez-Ferrer*, already noted, we held that a loaded revolver covered by a T-shirt within the defendant's reach on a cocaine-laden boat upon which the defendant was travelling was being "carried" for the purposes of § 924(c)(1). In neither case, however, did we have to decide whether a firearm in a vehicle in which a defendant is travelling needs to be within easy reach to be "carried" for the purposes of § 924(c)(1).

Since some circuits have, since *Bailey*, continued to rely upon their pre-*Bailey* "carry" case law, we look at ours as well, but find no case that is entirely on point. *See, e.g., United States v. Castro-Lara*, 970 F.2d 976, 982-83 (1st Cir.1992) (upholding a conviction under § 924(c)(1) when the gun was in a briefcase in a locked car trunk without specifying whether the conviction was under the statute's "use" or "carry" prong), *cert. denied*, 508 U.S. 962, 113 S.Ct. 2935, 124 L.Ed.2d 684 (1993); *Plummer*, 964 F.2d at 1252-54 (acknowledging the defendant-driver's concession that the presence of a gun in his vehicle either in the driver's seat or on the front passenger seat was sufficient to establish that he had "carried" a gun under § 924(c)(1)); *Eaton*, 890 F.2d at 511-12 (acknowledging the defendant's concession that he had "carried" a gun for the purposes of § 924(c)(1) when the gun had been under the front seat of the truck he was driving).

"When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."

Smith v. United States, 508 U.S. 223, 228, 113 S.Ct. 2050, 2054, 124 L.Ed.2d 138 (1993). In *Bailey*, the Supreme Court turned to the dictionary for help in determining the meaning of "use," *Bailey*, --- U.S. at ----, 116 S.Ct. at 506, so we do the same with "carry."

Webster's Third New International Dictionary of the English Language Unabridged 343 (3d ed. 1971) defines "carry" as, "1: to move while supporting (as in a vehicle or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place." *Webster's* goes on to list many other definitions of the word and then, in differentiating "carry" from some of its synonyms, states:

> CARRY indicates moving to a location some distance away while supporting or maintaining off the ground. Orig. indicating movement by car or cart, it is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden.

Id. This definition, therefore, clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition.

Black's Law Dictionary 214 (6th ed. 1990) defines "carry" as, "To bear, bear about, sustain, *transport*, remove, or *convey*. To have or bear upon or about one's person, as a watch or weapon; locomotion not being essential ...." (emphasis supplied). However, *Black's* defines the specific phrase "carry arms or weapons" more narrowly as, "To wear, bear, or carry them upon the person or in the clothing or in a

pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." *Id.*

The latter *Black's* definition of "carry arms or weapons" limits "carrying" to the defendant's person and so at least implies accessibility. However, even the circuits which have read an immediate accessibility requirement into "carry" under § 924(c)(1) have never limited the statutory language to "carrying" a firearm on the person. Indeed, such circuits, like the others to confront the issue, have all upheld convictions for "carrying" a weapon in a car. *See United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2d Cir.1996) (remanding two "carry" convictions to determine if a gun under a car's dashboard was accessible to either defendant); *Riascos-Suarez*, 73 F.3d at 623 (upholding a "carry" conviction when the gun was in a car near the driver's seat); *United States v. Willett*, 90 F.3d 404, 406-07 (9th Cir.1996) (holding that a gun transported in a car was "carried" because it was easily accessible).

We strongly doubt--given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle--that Congress, in prescribing liability for anyone who "uses or carries" a firearm during or in relation to a drug trafficking offense, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction. Hence the Black's Law Dictionary restricted definition of the phrase "carry arms or weapons" seems inapposite here.

It is true, of course, that to come under § 924(c)(1), "the firearm must have some purpose or effect with respect

to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238, 113 S.Ct. at 2059. In certain circumstances, a firearm's immediate accessibility to a defendant might be relevant to determining whether or not he was carrying it "during and in relation to" a drug trafficking crime, as the statute requires. 18 U.S.C. § 924(c)(1). But a firearm need not always be instantly accessible in order to be carried "during and in relation to" a drug trafficking crime. Here, the evidence shows that the defendants had placed the three firearms in question in the Mazda's trunk and, when arrested, were carrying them for the purpose of using them to rob their suppliers during the ongoing drug trafficking crime. Evidence of this purpose plainly demonstrated the necessary nexus to the drug trafficking offense wholly apart from whether the guns were within the immediate reach of those seated in the car at the time they were stopped by the agents.

As noted above, the Fourth, Seventh, and Tenth Circuits have held that a gun does not need to be readily accessible to be "carried" in a vehicle. *See Mitchell*, 104 F.3d at 652-54; *Molina*, 102 F.3d at 930-32; *Miller*, 84 F.3d at 1256-61.

Other circuits, while not explicitly deciding the issue one way or the other, appear to be leaning toward adopting the same approach. *See United States v. Pineda-Ortuno*, 952 F.2d 98, 103-04 (5th Cir.) (a pre-*Bailey* case holding that the circuit's cases requiring a showing that the gun was within the defendant's reach during the commission of the drug offense did not apply when the gun was "carried" in a vehicle), *cert. denied*, 504 U.S. 928, 112 S.Ct. 1990, 118 L.Ed.2d 587 (1992); *United States v. Fike*, 82 F.3d 1315, 1327-28 (5th Cir.1996) (a post-*Bailey* case upholding a

defendant's conviction under § 924(c)(1) for "carrying" a gun that was within his reach in a car but not stating that accessibility was a requirement); *United States v. Rivas*, 85 F.3d 193, 194-96 (5th Cir.) (same), *cert. denied*, --- U.S. ----, 117 S.Ct. 593, 136 L.Ed.2d 521 (1996); *United States v. Willis*, 89 F.3d 1371, 1377-79 (8th Cir.1996) (relying on pre-*Bailey* case law to hold that transporting a firearm in the passenger compartment of a vehicle satisfies the "carry" prong of § 924(c)(1) but not addressing the weapon's accessibility); *United States v. Caldwell*, 97 F.3d 1063, 1068-70 (8th Cir.1996) (upholding a conviction under § 924(c)(1)'s "carry" prong for a case in which the defendant's gun was in a car's hatchback, an area the court regarded as within the car's occupants' reach); *United States v. Farris*, 77 F.3d 391, 395 (11th Cir.1996) (relying on pre-*Bailey* case law to uphold a § 924(c)(1) conviction for a defendant who was sitting in the back seat of a car while the firearm in question was in the glove compartment but not discussing whether the defendant could easily have reached the gun).

We recognize that the Second, Sixth, and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible. *See Giraldo*, 80 F.3d at 676-78; *Riascos-Suarez*, 73 F.3d at 623-24; *Staples*, 85 F.3d at 464. We find the reasoning of these courts unpersuasive. In *Giraldo*, the Second Circuit relied entirely on its pre-*Bailey* case *United States v. Feliz-Cordero*, 859 F.2d 250 (2d Cir.1988), in holding that a gun transported in a vehicle must be immediately accessible to be "carried." But *Feliz-Cordero* merely stated that "carry" should be given its literal meaning. The court thought that the literal meaning of "carry," when the "carrying" was done by a vehicle, required the gun to be within reach during the commission of the drug

offense. *Feliz-Cordero*, 859 F.2d at 253. The court did not refer to any authority for this proposition and cited to only one case, *United States v. Brockington*, 849 F.2d 872 (4th Cir.1988). *Brockington* does not so much as mention an immediate accessibility requirement, nor does it discuss the meaning of "carry." The only relevance *Brockington* has to this issue is that that panel upheld the "carry" conviction of a taxi cab passenger who had a loaded pistol under the floormat beneath his seat.

The Sixth Circuit in *Riascos-Suarez* inferred the immediate availability requirement from the Supreme Court's admonitions in *Bailey* that "use" must mean more than "possession," *Bailey*, --- U.S. at ----, 116 S.Ct. at 508, and that a defendant could not be charged under § 924(c)(1) for mere storage of a weapon, id. The easy reach requirement, the *Riascos-Suarez* panel reasoned, is necessary to distinguish "carry" from possession and storage. *Riascos-Suarez*, 73 F.3d at 623.

We disagree. We question the degree to which an easy reach requirement would differentiate "carry" from "possess." More importantly, we agree with the Tenth Circuit that the distinguishing characteristic of "carry" is not the instant availability of the item carried, but the fact that the item is being moved from one place to another by the carrier, either personally or with the aid of some appropriate vehicle. *See Miller*, 84 F.3d at 1260.

The Ninth Circuit's decision in *Staples* relied primarily on its earlier opinion in *United States v. Hernandez*, 80 F.3d 1253, 1256-58 (9th Cir.1996) (holding that a gun in a locked toolbox was not "carried" under § 924(c)(1)), in stating that a firearm had to be immediately

available for use to be "carried" in a vehicle. The *Hernandez* panel looked to find the ordinary or natural meaning of "carry." But its quotation from *Webster's* definition of "carry," *supra*, was selective, omitting the definition's references to vehicles. The court also quoted from *Black's* definition of the single phrase, "carry arms or weapons," supra, and cited the Sixth Circuit's *Riascos-Suarez* opinion.

As we have discussed, however, the ordinary meaning of the term "carry" includes transport by vehicle and affords no basis for imposing an accessibility requirement.

Turning to the case before us, both Cleveland and Gray pled guilty to using or carrying a weapon during and in relation to a drug trafficking offense. They do not now contend, nor could they, that the three loaded handguns found in the trunk of their car alongside rope and duct tape were unrelated to the drug trafficking offense they were committing at the time they were apprehended. In fact, Cleveland admitted at the suppression hearing that he and Gray intended to use the guns to rob the drugs from their suppliers. Their challenge to their convictions on the § 924(c)(1) charge consists solely of the claim that, after *Bailey*, they can not be convicted under the statute's "use" prong and that a conviction under the "carry" prong would require the guns to have been easily accessible. As under the standard definition of "carry" the guns were being "carried," and as we can see no basis for holding that the guns' lack of instant accessibility precluded them from being "carried," we affirm Cleveland's and Gray's convictions for violations of 18 U.S.C. § 924(c)(1).

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL CASE NO. 95-10292-REK

UNITED STATES OF AMERICA

v.

JUAN RODRIGUEZ, RAMON VASQUEZ,
ENRIQUE GRAY and DONALD CLEVELAND,
Defendants

Memorandum and Order
April 25, 1996

Before this court is defendant Enrique Gray's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 175, filed December 8, 1995). Defendant Gray makes this motion under Federal Rule of Criminal Procedure 35(c) and, in the alternative, under 28 U.S.C. §2255, and he also seeks to withdraw his plea.

Because a final judgment in this case has not yet been entered as to defendant Gray, the court treats the pending motion as a motion to reconsider sentencing, and, in the alternative, to withdraw his plea. In any event, whatever the most appropriate procedural label may be, I conclude that it is appropriate to decide defendant Gray's challenge to the sentence on the merits.

I. Background

The relevant facts giving rise to Defendant Gray's arrest and guilty plea are summarized here. These facts are based on the summary of evidence presented by the government during defendant Gray's Change of Plea Hearing. At that hearing, defendant Gray agreed that he did the acts attributed to him in the summary of evidence.

Before October 18, 1994 defendant Gray arranged with defendant Rodriguez to purchase between five and eight kilograms of cocaine. Defendant Rodriguez made arrangements to get the cocaine and transport it to Boston. Defendant Gray called his friend, defendant Cleveland, in Boston to alert him to an opportunity to make some money. After arrival in Boston, defendant Gray made plans with defendant Cleveland to meet defendant Rodriguez and associates of Rodriguez and to steal some of the cocaine rather than purchase it. Defendants Gray and Cleveland, "pursuant to the plan to steal it [the cocaine]," obtained weapons.

Meanwhile, agents of the Drug Enforcement Administration ("DEA agents") in Connecticut had a known drug trafficker under surveillance at an apartment complex in Rocky Hill, Connecticut. Four individuals, including defendants Rodriguez and Vasquez, were observed leaving the apartment complex. Defendant Rodriguez was driving a white Isuzu, and defendant Vasquez and the other two individuals were in a Lexus. DEA agents followed the vehicles from Connecticut into Boston to the vicinity of Symphony Hall. The driver of the Lexus was observed talking with defendant Gray who was sitting in a white Mazda driven by defendant Cleveland. All three vehicles

were eventually observed parked close together on St. Stephens Street. At this point, defendant Vasquez was seen sitting in the back seat of the Mazda. The Lexus departed and defendant Gray was then observed getting into the Isuzu with defendant Rodriguez. Both vehicles then attempted to leave the area. The DEA agents stopped and detained all of the defendants and searched both vehicles. The agents confiscated six kilograms of cocaine found in a hidden compartment of the Isuzu and three handguns found in the trunk of the Mazda.

On July 21, 1995 Defendant Gray pled guilty to counts three and five of the second superseding indictment. Under count three, defendant Gray was charged with attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §846, and under count five, defendant Gray was charged with carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1).

On November 29, 1995 defendant Gray was sentenced to 120 months in prison for the offense charged in count three, and, concurrently, 60 months for the offense charged in count five, to be followed by 60 months supervised release.

On December 6, 1995 the Supreme Court issued an opinion in *Bailey v. United States*, 116 S.Ct. 501 (1995), in which the Court narrowed the interpretation of "use" under §924(c)(1). Defendant Gray now challenges the sentence imposed on him at the November 29, 1995 hearing and contends that the factual basis for his guilty plea to count five no longer constitutes a crime under the new interpretation of §924(c)(1) announced in *Bailey*.

II.

A. Interpretation of §924(c)(1) under *Bailey v. United States*

Before the decision announced in *Bailey v. United States*, convictions for "use" under §924(c)(1) were upheld in this circuit where a firearm was simply present for the protection of drugs for sale. *See, United States v. McFadden*, 13 F.3d 463 (1st Cir. 1994) (presence of an unloaded gun between mattress and boxspring in defendant's apartment is sufficient evidence for "use" of a firearm in violation of §924(c)(1) under "fortress" theory). In *Bailey*, a unanimous Court rejected application of the statute on the basis of a "fortress" theory and held that in order to support a finding of "use" under §924(c)(1), the evidence must be "sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. The Court stated that active employment includes, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Defendant Gray asserts that under this new interpretation his guilty plea to count five is not supported by sufficient facts and therefore his sentence for the violation in count five should be vacated. The government contends that there is no basis on which to vacate defendant Gray's sentence because he was also indicted for and pled guilty to "carrying" a firearm in violation of §924(c)(1) and a sufficient factual basis exists to support his guilty plea.

Under the definition of "use" announced in *Bailey*,

there is no evidence in this case that defendant Gray ever "used" a firearm in relation to drug trafficking. But, in *Bailey* the Court explicitly did not address whether there was evidence sufficient to convict the defendant of "carrying" a firearm in violation of §924(c)(1). Bailey's conviction was based on evidence of a loaded pistol that was found in a bag in the trunk of his car. *Id.* at 504. The Court remanded the case for the Court of Appeals for the District of Columbia Circuit to consider whether there was a basis for upholding the conviction under the "carry" prong of the statute. *Id.* at 509.

Although the Court in *Bailey* interpreted only the "use" prong of §924(c)(1), its approach to analyzing the statute, as well as First Circuit cases before *Bailey*, are instructive.

B. Carrying a Firearm in Violation of §924(c)(1)

Section 924(c)(1) states in relevant part:

> Whoever, during and in relation to any...drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such...drug trafficking crime, be sentenced to imprisonment for five years.

In order to support a finding of violation of §924(c)(1) the evidence must show that 1) a defendant either used or carried a firearm and 2) that it was in relation to drug trafficking activity. *See, United States v. Wight*, 968 F.2d 1393, 1396 (1st Cir. 1992). Because the evidence on which defendant Gray pled guilty is not enough to support a conviction for the "use" prong of §924(c)(1), as it was

interpreted in *Bailey*, defendant Gray's plea to count five of the second superseding indictment can stand only if the evidence on which he pled guilty is sufficient to show that he "carried" a firearm "in relation to" drug trafficking activity.

The Court in *Bailey* states that Congress would have used the word "possess" if it had meant for possession of a firearm to constitute a violation of §924(c)(1). *Id.* at 506. For that reason, "carry" must mean more than mere possession of a firearm. *See also, United States v. Plummer*, 964 F.2d 1251 (1st Cir. 1992) (mere possession of a gun during the course of criminal conduct will not support a conviction). In addition, if a word is not explicitly defined by statute, it should be given its ordinary meaning. *See, United States v. Manning*, -- F.3d -- (1st Cir. 1996), 1996 WL 116990 (3/21/96), *citing, Smith v. United States*, 113 S.Ct. 2050, 2054 (1993) (noting that words not defined by statute should be given their ordinary or common meaning). The Random House Dictionary of the English Language, Second Edition (1987), defines "carry" as follows: "to take or support from one place to another; convey; transport."

Defendant Gray contends that, after the decision announced in *Bailey*, "carry" must be interpreted to mean "on or about the defendant's person." Some circuits have required a showing that a firearm has been on or about the defendant's person in order to support liability under the "carry" prong of §924(c)(1). *See e.g., United States v. Hernandez*, -- F.3d -- (9th Cir. 1996), 1996 WL 34822 (1/31/96) (gun found inside a locked toolbox during the drug trafficking crime was not "carried" under §924(c)(1)); *and, United States v. White*, -- F.3d -- , (8th Cir. 1996), 1996 WL 154228 (3/21/96) (court upheld defendant's conviction for "carrying" a firearm where gun was found under coat

discarded by the defendant during flight from police). But, other circuits have required only that a firearm be accessible. *See e.g., United States v. Feliz-Cordero*, 859 F.2d 250, 253 (2nd Cir. 1988) (a firearm is carried if it was "within reach during the commission of the drug offense"). Since the decision in *Bailey* was announced, no circuit has decided whether evidence of guns found in a bag in a locked trunk, along with evidence that the guns were acquired and transported for use in relation to the drug trafficking crime, is sufficient to support a conviction for "carrying" a firearm in violation of §924(c)(1). *See e.g., United States v. Baker*, 78 F.3d 1241, 1247 (7th Cir. 1996) (court explicitly stated that its decision did not state an opinion "on whether a defendant who has drugs and a fully operable and loaded gun locked in the trunk of his car could be convicted under §924(c)(1) for carrying a firearm"). In fact, consideration of the same issue was left to the Court of Appeals for the District of Columbia Circuit when the Supreme Court remanded *Bailey*.

I conclude that I cannot sustain defendant Gray's contention that "[i]n this Circuit, a §924(c)(1) conviction for carrying has required that the weapon be immediately accessible." Defendant Gray's Memorandum in Support of Motion for Correction of Sentence (Docket No. 177), p.5. In both cases cited by defendant Gray for this proposition, the court was addressing the "in relation to" requirement of the statute and did not make a decision about the requirement for which defendant Gray cites them. *See, United States v. Plummer*, 964 F.2d 1251, 1253-1254 (1st Cir. 1992) ("Defendant conceded that the presence of the gun in his vehicle was sufficient to establish...that he 'carried a firearm' [citations omitted]. Defendant argues, however, that the evidence was insufficient to establish...that he carried the gun 'in relation to'..."); *and, United States v. Payero*, 888 F.2d

928, 929 (1st Cir. 1989) (where "[t]he only issue on appeal was whether the trial court correctly and adequately instructed the jury with respect to the 'during and in relation to' element [of] the statute").

In the First Circuit, two cases decided since *Bailey* have addressed the scope of "carry". In *United States v. Manning*, -- F.3d -- (1st Cir. 1996), 1196 WL 116990, 2 (3/21/96), the court did not define the "precise contours" of "carry", but held that "Manning's actions me[]t any reasonable contours of the 'carry' prong." In *Manning*, the defendant was observed carrying a briefcase into a garage. Shortly thereafter, a police officer found the briefcase that contained cocaine, a handgun and six pipebombs. In *United States v. Ramirez-Ferrer*, -- F.3d -- (1st Cir. 1996), 1996 WL 125595, 4 (3/27/96), the court, sitting en banc, vacated the defendants' convictions under the "use" prong, but required reconsideration by the panel on the "carry" prong "since *Bailey* has both limited the word 'use' to the extent that it cannot apply in the instant case and emphasized that 'carry' has meanings not covered by 'use'." In *Ramirez-Ferrer* a loaded handgun was found covered by a t-shirt in a storage compartment near the location where one of the defendants had been sitting when the defendants' boat, in which they were transporting cocaine, was interdicted off the coast of Puerto Rico. *Id.* at 2. Both cases recognize that the ordinary meaning of "carry" includes transporting a firearm without actually holding it.

Before *Bailey*, courts in this circuit did not clearly distinguish between "use" and "carry" under §924(c)(1). But, convictions for violations under §924(c)(1) were upheld where a firearm was found in a vehicle, but was not necessarily accessible to the defendant. In those cases the

focus was on the "facilitative nexus" between the possession of the firearm and its role in the criminal activity. *See, United States v. Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992); *and, United States v. Reyes-Mercado*, 22 F.3d 363 (1st Cir. 1994).

In *Castro-Lara*, the case most closely analogous to the one before this court, an unloaded firearm and live ammunition were found in a briefcase in the locked trunk of the defendant's car. Authorities apprehended the defendants when they were about to drive off carrying cocaine that they picked up at an airstrip. The court in *Castro-Lara* focused on the location of the firearm ("at the place where drugs were to be delivered") and the defendant's timing (the defendant "brought the gun to the airstrip in the course of taking delivery of...cocaine") in affirming the defendant's conviction. *Castro-Lara*, 970 F.2d at 983. The court held that the evidence was sufficient to show that the gun was "available for use in connection with the narcotics trade," rejected any requirement that the gun be on the defendant's person, and did not hold "instant availability" to be the critical concern. *Id.* The court in *Castro-Lara* also noted First Circuit cases in which a firearm found in a defendant's vehicle, but not on his person, was sufficient to support a conviction under §924(c)(1). *Id.* The focus in those cases has been to distinguish from "mere possession," but not require that a defendant have actively employed a firearm. Although the interpretation of §924(c)(1) in *Bailey* creates a requirement for "active employment" when there is an indictment for "use", the Court made it clear that "carry" must be given a distinct and separate meaning. *Bailey*, 116 S.Ct. at 507.

The analysis in *Castro-Lara* is in accord with the

Court's emphasis in *Bailey* on congressional intent that "require[s] more than possession to trigger the statute's application." *Id.* In *Bailey*, the Court decided what "more" means when there is an indictment for "use", but not when there is an indictment for "carry". The evidence is this case indicates that defendants Gray and Cleveland did more than merely possess the three guns. During the afternoon of October 18, 1994 defendants Cleveland and Gray planned to steal the cocaine, obtained guns that were placed in a bag in the trunk of the Mazda, and then transported the guns to the meeting with defendants Rodriguez and Vasquez. As in *Castro-Lara*, both the location of the guns (in the car they were using in their drug trafficking scheme) and defendant Gray's and defendant Cleveland's timing (obtaining the guns in order to steal the cocaine) indicates that defendants Gray and Cleveland controlled the guns and that the guns facilitated their attempt to possess cocaine. By their own admissions the guns had a central role in their scheme to possess some, if not all, of the cocaine being transported in the Isuzu.

The First Circuit cases cited above contrast with defendant Gray's contention that there is a requirement in this circuit that a firearm be on or about the defendant's person in order to support a finding of violation of §924(c)(1). This circuit has consistently recognized the various ways that firearms may be carried in relation to a drug trafficking crime -- whether by hand, in a briefcase, or somewhere in a vehicle. Recognizing that often vehicles are used to carry both drugs and firearms, the Fifth Circuit has further defined "carry" in both the vehicle and non-vehicle contexts. *See, United States v. Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992). In *Pineda-Ortuno*, the court held that the literal meaning of "carry" includes carriage by a vehicle, but

easy access to a firearm is not a requirement as long as the defendant knowingly carried the firearm in the vehicle and did so in relation to a drug trafficking crime. *Id.* at 104. Defendants Gray and Cleveland admitted to obtaining guns and, in the ordinary sense of the word, carried the guns in the Mazda.

C. "In relation to"

The Supreme Court has held that the "in relation to" language in §924(c)(1) "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, 113 S.Ct. 2050, 2059 (1993). It was no accident that there were three guns in the trunk of the Mazda. Defendants Gray and Cleveland obtained the guns for the purpose of stealing the cocaine from defendant Rodriguez and his associates. Therefore, the "in relation to" prong of the statute is met.

D. Aiding and Abetting

Defendant Gray also contends that because he was not a passenger of the vehicle in which the guns were found, he could not have been carrying them. At his sentencing hearing, defendant Gray was read the second superseding indictment that includes the charge of aiding and abetting in both counts three and five. Defendant Gray indicated at the hearing that he understood those charges. Transcript of Change of Plea Hearing, p. 8. He cannot prevail on a contention that he did not understand the charges. In any event, the evidence presented by the government showed that defendant Gray "associated himself with the venture, participated in it as in something he wished to bring about,

and sought by his actions to make it succeed." *United States v. Alvarez*, 987 F.2d 77, 83 (1st Cir. 1993). Defendant Gray cannot now prevail on a contention that his plea is not supported by the evidence simply because he was not in the car when the DEA agents detained all of the defendants.

III. Conclusion

The evidence in the case now before this court is a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime. Although *Bailey* restricts the definition of "use" under §924(c)(1) and the evidence does not support defendant Gray's guilty plea for "using" a firearm, the evidence does support his guilty plea for "carrying" a firearm. Defendant Gray initiated this venture by arranging to purchase cocaine from defendant Rodriguez. Defendants Gray and Cleveland pursued their plan to steal the cocaine by obtaining guns and carrying them in the Mazda to their meeting with defendant Rodriguez. That their plan made holding the guns in their hands impractical and that vehicles are commonly used for carrying both guns and drugs only strengthen what is already sufficient evidence to support defendant Gray's guilty plea to count five of the second superseding indictment.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

(1) Defendant Gray's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 175) is DENIED.

(2) Further hearing as to the form of the sentence and entry of judgment is set for 2:00 p.m. on May 21, 1996.

/S/
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL CASE NO. 95-10292-REK

UNITED STATES OF AMERICA

v.

JUAN RODRIGUEZ, RAMON VASQUEZ, ENRIQUE GRAY and DONALD CLEVELAND, Defendants

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Memorandum and Order
April 25, 1996

Before this court is defendant Donald Cleveland's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 181, filed January 11, 1996). Defendant Cleveland makes this motion under Federal Rule of Criminal Procedure 35(c) and, in the alternative, under 28 U.S.C. §2255.

Defendant Cleveland has already filed an appeal, as allowed under his conditional plea. This court nevertheless considers the motion now in order to inform the Clerk of the Court of Appeals of the order that this court would enter if directed by the Court of Appeals to hear and decide the motion despite the pendency of the appeal. *See, Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979) (when an appeal has been filed,

district court should hear the motion and report what its order would be if authorized by the Court of Appeals to hear it.)

I. Background

The relevant facts giving rise to Defendant Cleveland's arrest and guilty plea are summarized here. These facts are based on the summary of evidence presented by the government during defendant Cleveland's Change of Plea Hearing. At that hearing, defendant Cleveland agreed that he did the acts attributed to him in the summary of evidence.

Before October 18, 1994 defendant Gray arranged with defendant Rodriguez to purchase between five and eight kilograms of cocaine. Defendant Rodriguez made arrangements to get the cocaine and transport it to Boston. Defendant Gray called his friend, defendant Cleveland, in Boston to alert him to an opportunity to make some money. After arrival in Boston, defendant Gray made plans with defendant Cleveland to meet defendant Rodriguez and associates of Rodriguez and to steal some of the cocaine rather than purchase it. Defendants Gray and Cleveland, "pursuant to the plan to steal it [the cocaine]," obtained weapons.

Meanwhile, agents of the Drug Enforcement Administration ("DEA agents") in Connecticut had a known drug trafficker under surveillance at an apartment complex in Rocky Hill, Connecticut. Four individuals, including defendants Rodriguez and Vasquez, were observed leaving that apartment complex. Defendant Rodriguez was driving a white Isuzu, and defendant Vasquez and the other two individuals were in a Lexus. DEA agents followed the

vehicles from Connecticut into Boston to the vicinity of Symphony Hall. The driver of the Lexus was observed talking with defendant Gray who was sitting in a white Mazda driven by defendant Cleveland. All three vehicles were eventually observed parked close together on St. Stephens Street. At this point defendant Vasquez was seen sitting in the back seat of the Mazda. The Lexus departed and defendant Gray was then observed getting into the Isuzu with defendant Rodriguez. Both vehicles then attempted to leave the area. The DEA agents stopped and detained all of the defendants and searched both vehicles. The agents confiscated six kilograms of cocaine found in a hidden compartment of the Isuzu and three handguns found in the trunk of the Mazda.

On July 17, 1995 Defendant Cleveland pled guilty to counts three and four of the second superseding indictment. Under count three, defendant Cleveland was charged with attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §846, and under count four, defendant Cleveland was charged with carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1).

On October 17, 1995 defendant Cleveland was sentenced to 120 months in prison for the offense charged in count three, and, concurrently, 60 months for the offense charged in count four, to be followed by 60 months supervised release. Defendant Cleveland's plea was conditioned upon allowance of his right to challenge on appeal the denial of his motion to suppress the evidence found in the Mazda (Docket No. 48, filed November 21, 1994; denied May 5, 1995). That appeal was filed on November 1, 1995, the day on which his final judgment was

entered.

On December 6, 1995 the Supreme Court issued an opinion in *Bailey v. United States*, 116 S.Ct. 501 (1995), in which the Court narrowed the interpretation of "use" under §924(c)(1).

Defendant Cleveland now challenges the sentence imposed on him at the October 17, 1995 hearing and contends that the factual basis for his guilty plea to count four did not constitute a crime under the new interpretation of §924(c)(1) announced in *Bailey*.

II.

A. Procedural Posture of the Motion

Defendant Cleveland cannot now obtain relief under Federal Rule of Criminal Procedure 35(c) because a motion under that rule must be made within seven days after the imposition of sentence. Seven days had elapsed long before defendant filed the pending motion on January 11, 1996.

As explained below, however, defendant Cleveland may proceed under 28 U.S.C. §2255. For this reason, his present motion will be considered by this court, under procedures consistent with *SS Zoe Colocotroni*.

It is the practice of the Clerk of this Court to treat a motion under §2255 as a new civil proceeding. I conclude that defendant Cleveland's filing of the pending motion, and the Clerk's receiving and filing it, as part of his original criminal case do not create any impediment to this court's consideration of the motion on the merits.

B. Retroactive Application of Substantive Law

In *Sanabria v. United States*, 916 F.Supp. 106 (D.P.R. 1996), the new rule of substantive law announced in *Bailey* was applied retroactively to Sanabria's conviction for a violation of §924(c)(1). Similarly, it is appropriate to apply the *Bailey* rule retroactively to defendant Cleveland's guilty plea. Such a retroactive application is consistent with the Supreme Court's approach in *Davis v. United States*, 417 U.S. 333 (1974), where, under a subsequent change in the substantive law, Davis could not be lawfully convicted and the Court found that "Davis' conviction and punishment [were] for an act that the law does not make criminal...[and t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under §2255." *Id.* at 346-347; *See also, United States v. Fletcher*, -- F.Supp. -- (D. Kan. 1996), 1996 WL 109782, 3 (3/5/96) (noting cases in which courts have applied *Bailey* retroactively in response to §2255 motions where sentences were imposed based on defendants' guilty pleas). Defendant Cleveland's motion is therefore appropriately before this court, for this court to consider whether defendant's guilty plea and sentence were for "an act that the law does not make criminal" because of the change announced in *Bailey*.

C. Interpretation of §924(c)(1) under *Bailey v. United States*

Before the decision announced in *Bailey v. United States*, convictions for "use" under §924(c)(1) were upheld in this circuit where a firearm was simply present for the protection of drugs for sale. *See, United States v. McFadden*,

13 F.3d 463 (1st Cir. 1994) (presence of an unloaded gun between mattress and boxspring in defendant's apartment is sufficient evidence for "use" of a firearm in violation of §924(c)(1) under "fortress" theory). In *Bailey*, a unanimous Court rejected application of the statute on the basis of a "fortress" theory and held that in order to support a finding of "use" under §924(c)(1), the evidence must be "sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. The Court stated that active employment includes, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Defendant Cleveland asserts that under this new interpretation his guilty plea to count four is not supported by sufficient facts and therefore his sentence for the violation in count four should be vacated. The government contends that there is no basis on which to vacate defendant Cleveland's sentence because he was also indicted for and pled guilty to "carrying" a firearm in violation of §924(c)(1) and a sufficient factual basis exists to support his guilty plea.

Under the definition of "use" announced in *Bailey*, there is no evidence in this case that defendant Cleveland ever "used" a firearm in relation to drug trafficking. But, in *Bailey* the Court explicitly did not address whether there was evidence sufficient to convict the defendant of "carrying" a firearm in violation of §924(c)(1). Bailey's conviction was based on evidence of a loaded pistol that was found in a bag in the trunk of his car. *Id.* at 504. The Court remanded the case for the Court of Appeals for the District of Columbia Circuit to consider whether there was a basis for upholding the conviction under the "carry" prong of the statute. *Id.* at

509.

Although the Court in *Bailey* interpreted only the "use" prong of §924(c)(1), its approach to analyzing the statute, as well as First Circuit cases before *Bailey*, are instructive.

D. Carrying a Firearm in Violation of §924(c)(1)

Section 924(c)(1) states in relevant part:

> Whoever, during and in relation to any...drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such...drug trafficking crime, be sentenced to imprisonment for five years.

In order to support a finding of violation of §924(c)(1) the evidence must show that 1) a defendant either used or carried a firearm and 2) that it was in relation to drug trafficking activity. *See, United States v. Wight*, 968 F.2d 1393, 1396 (1st Cir. 1992). Because the evidence on which defendant Cleveland pled guilty is not enough to support a conviction for the "use" prong of §924(c)(1), as it was interpreted in *Bailey*, defendant Cleveland's plea to count four of the second superseding indictment can stand only if the evidence on which he pled guilty is sufficient to show that he "carried" a firearm "in relation to" drug trafficking activity.

The Court in *Bailey* states that Congress would have used the word "possess" if it had meant for possession of a firearm to constitute a violation of §924(c)(1). *Id.* at 506. For that reason, "carry" must mean more than mere

possession of a firearm. *See also, United States v. Plummer*, 964 F.2d 1251 (1st Cir. 1992) (mere possession of a gun during the course of criminal conduct will not support a conviction). In addition, if a word is not explicitly defined by statute, it should be given its ordinary meaning. *See, United States v. Manning*, -- F.3d -- (1st Cir. 1996), 1996 WL 116990 (3/21/96), *citing, Smith v. United States*, 113 S.Ct. 2050, 2054 (1993) (noting that words not defined by statute should be given their ordinary or common meaning). The Random House Dictionary of the English Language, Second Edition (1987), defines "carry" as follows: "to take or support from one place to another; convey; transport."

Defendant Cleveland contends that, after the decision announced in *Bailey*, "carry" must be interpreted to mean "on or about the defendant's person." Some circuits have required a showing that a firearm has been on or about the defendant's person in order to support liability under the "carry" prong of §924(c)(1). *See e.g., United States v. Hernandez*, -- F.3d -- (9th Cir. 1996), 1996 WL 34822 (1/31/96) (gun found inside a locked toolbox during the drug trafficking crime was not "carried" under §924(c)(1)); *and, United States v. White*, -- F.3d -- , (8th Cir. 1996), 1996 WL 154228 (4/4/96) (court upheld defendant's conviction for "carrying" a firearm where gun was found under coat discarded by the defendant during flight from police). But, other circuits have required only that a firearm be accessible. *See e.g., United States v. Feliz-Cordero*, 859 F.2d 250, 253 (2nd Cir. 1988) (a firearm is carried if it was "within reach during the commission of the drug offense"). Since the decision in *Bailey* was announced, no circuit has decided whether evidence of guns found in a bag in a locked trunk, along with evidence that the guns were acquired and transported for use in relation to the drug trafficking crime, is

sufficient to support a conviction for "carrying" a firearm in violation of §924(c)(1). *See e.g., United States v. Baker*, 78 F.3d 1241, 1247 (7th Cir. 1996) (court explicitly stated that its decision did not state an opinion "on whether a defendant who has drugs and a fully operable and loaded gun locked in the trunk of his car could be convicted under §924(c)(1) for carrying a firearm"). In fact, consideration of the same issue was left to the Court of Appeals for the District of Columbia Circuit when the Supreme Court remanded *Bailey*.

I conclude that I cannot sustain defendant Cleveland's contention that "[i]n this Circuit, a §924(c)(1) conviction for carrying has required that the weapon be immediately accessible." Defendant Cleveland's Memorandum in Support of Motion for Correction of Sentence (Docket No. 182), p.5. In both cases cited by defendant Cleveland for this proposition, the court was addressing the "in relation to" requirement of the statute and did not make a decision about the requirement for which Cleveland cites them. *See, United States v. Plummer*, 964 F.2d 1251, 1253-1254 (1st Cir. 1992) ("Defendant conceded that the presence of the gun in his vehicle was sufficient to establish ... that he 'carried a firearm' [citations omitted]. Defendant argues, however, that the evidence was insufficient to establish...that he carried the gun 'in relation to'..."); *and, United States v. Payero*, 888 F.2d 928, 929 (1st Cir. 1989) (where "[t]he only issue on appeal was whether the trial court correctly and adequately instructed the jury with respect to the 'during and in relation to' element [of] the statute").

In the First Circuit, two cases decided since *Bailey* have addressed the scope of "carry". In *United States v. Manning*, -- F.3d -- (1st Cir. 1996), 1996 WL 116990, 2 (3/21/96), the court did not define the "precise contours" of

"carry", but held that "Manning's actions me[]t any reasonable contours of the 'carry' prong." In *Manning*, the defendant was observed carrying a briefcase into a garage. Shortly thereafter, a police officer found the briefcase that contained cocaine, a handgun and six pipebombs. In *United States v. Ramirez-Ferrer*, -- F.3d -- (1st Cir. 1996), 1996 WL 125595, 4 (3/27/96), the court, sitting en banc, vacated the defendants' convictions under the "use" prong, but required reconsideration by the panel on the "carry" prong "since *Bailey* has both limited the word 'use' to the extent that it cannot apply in the instant case and emphasized that 'carry' has meanings not covered by 'use'". In *Ramirez-Ferrer* a loaded handgun was found covered by a t-shirt in a storage compartment near the location where one of the defendants had been sitting when the defendants' boat, in which they were transporting cocaine, was interdicted off the coast of Puerto Rico. *Id.* at 2. Both cases recognize that the ordinary meaning of "carry" includes transporting a firearm without actually holding it.

Before *Bailey*, courts in this circuit did not clearly distinguish between "use" and "carry" under §924(c)(1). But, convictions for violations under §924(c)(1) were upheld where a firearm was found in a vehicle, but was not necessarily accessible to the defendant. In those cases the focus was on the "facilitative nexus" between the possession of the firearm and its role in the criminal activity. *See, United States v. Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992); *and, United States v. Reyes-Mercado*, 22 F.3d 363 (1st Cir. 1994).

In *Castro-Lara*, the case most closely analogous to the one before this court, an unloaded firearm and live ammunition were found in a briefcase in the locked trunk of

the defendant's car. Authorities apprehended the defendants when they were about to drive off carrying cocaine that they picked up at an airstrip. The court in *Castro-Lara* focused on the location of the firearm ("at the place where drugs were to be delivered") and the defendant's timing (the defendant "brought the gun to the airstrip in the course of taking delivery of...cocaine") in affirming the defendant's conviction. *Castro-Lara*, 970 F.2d at 983. The court held that the evidence was sufficient to show that the gun was "available for use in connection with the narcotics trade", rejected any requirement that the gun be on the defendant's person, and did not hold "instant availability" to be the critical concern. *Id.* The court in *Castro-Lara* also noted First Circuit cases in which a firearm found in a defendant's vehicle, but not on his person, was sufficient to support a conviction under §924(c)(1). *Id.* The focus in those cases has been to distinguish from "mere possession", but not require that a defendant have actively employed a firearm. Although the interpretation of §924(c)(1) in *Bailey* creates a requirement for "active employment" when there is an indictment for "use", the Court made it clear that "carry" must be given a distinct and separate meaning. *Bailey*, 116 S.Ct. at 507.

The analysis in *Castro-Lara* is in accord with the Court's emphasis in *Bailey* on congressional intent that "require[s] more than possession to trigger the statute's application". *Id.* In *Bailey*, the Court decided what "more" means when there is an indictment for "use", but not when there is an indictment for "carry". The evidence is this case indicates that defendants Cleveland and Gray did more than merely possess the three guns. During the afternoon of October 18, 1994 defendants Cleveland and Gray planned to steal the cocaine, obtained guns that were placed in a bag in

the trunk of the Mazda, and then transported the guns to the meeting with defendants Rodriguez and Vasquez. As in *Castro-Lara*, both the location of the guns (in the car they were using in their drug trafficking scheme) and defendant Cleveland's and defendant Gray's timing (obtaining the guns in order to steal the cocaine) indicates that defendants Cleveland and Gray controlled the guns and that the guns facilitated their attempt to possess cocaine. By their own admissions the guns had a central role in their scheme to possess some, if not all, of the cocaine being transported in the Isuzu.

The First Circuit cases cited above contrast with defendant Cleveland's contention that there is a requirement in this circuit that a firearm be on or about the defendant's person in order to support a finding of violation of §924(c)(1). This circuit has consistently recognized the various ways that firearms may be carried in relation to a drug trafficking crime -- whether by hand, in a briefcase, or somewhere in a vehicle. Recognizing that often vehicles are used to carry both drugs and firearms, the Fifth Circuit has further defined "carry" in both the vehicle and non-vehicle contexts. *See, United States v. Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992). In *Pineda-Ortuno*, the court held that the literal meaning of "carry" includes carriage by a vehicle, but easy access to a firearm is not a requirement as long as the defendant knowingly carried the firearm in the vehicle and did so in relation to a drug trafficking crime. *Id.* at 104. Defendants Cleveland and Gray admitted to obtaining the guns and, in the ordinary sense of the word, carried the guns in the Mazda.

E. "In relation to"

The Supreme Court has held that the "in relation to" language in §924(c)(1) "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, 113 S.Ct. 2050, 2059 (1993). It was no accident that there were three guns in the trunk of the Mazda. Defendants Cleveland and Gray obtained the guns for the purpose of stealing the cocaine from defendant Rodriguez and his associates. Therefore, the "in relation to" prong of the statute is met.

III. Conclusion

The evidence in the case now before this court is a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime. Although *Bailey* restricts the definition of "use" under §924(c)(1) and the evidence does not support defendant Cleveland's guilty plea for "using" a firearm, the evidence does support his guilty plea for "carrying" a firearm. Defendant Cleveland drove the vehicle in which he and defendant Gray carried the guns in relation to their attempt to possess cocaine. That their plan made holding the guns impractical and that vehicles are commonly used for carrying both guns and drugs, only strengthen what is already sufficient evidence to support defendant Cleveland's guilty plea to count four of the second superseding indictment.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

(1) Defendant Cleveland's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 181) is DENIED.

(2) The Clerk will deliver forthwith, to the Clerk of the Court of Appeals, a copy of this Memorandum and Order.

/S/
United States District Judge